

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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A-KINBO JIHAD-SURU HASHIM; a/k/a JOHN  
D. TIGGS, JR.; EZRA C. MARTIN, DEMETRIUS  
L. ROBERTSON; DANIEL L. SMITH; RONALD E. JACKSON;  
AL ROY CURTIS; DERRICK SANDERS; ERIC M.  
WASHINGTON; DONALD C. LEE; MICHAEL S.  
JOHNSON; JAMES PRICE; RUFUS LYNCH;  
TONY EPPENGER; MICHAEL A. SCIORTINO;  
ROBERT E. SALLIE; RAYNARD JACKSON;  
CORNELIOUS MADDOX; AMOS T. CRAIG;  
TIMOTHY REED; SAMMY J. GATES;  
JONATHAN P. COLE; DAVID HUDSON;  
EZRA C. MARTIN, JR.; RODOSVALDO POZO;  
NORMAN C. GREEN, JR.; EUGENE CHERRY;  
STANLEY FELTON; LAMONT BROWN; DENNIS JONES-EL,  
GLENN TURNER; and ALPHONCY DANGERFIELD,<sup>1</sup>

ORDER  
01-C-314-C

Petitioners,

v.

WARDEN GERALD A. BERGE and  
ATTORNEY GENERAL JAMES E. DOYLE, JR.,

Respondents.

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<sup>1</sup>In the caption of previous court orders entered in this case, Anthony Murry, a prisoner at the North Fork Correctional Institution in Sayre, Oklahoma, has been listed as a petitioner. This was a mistake apparently brought about when a trust fund account statement from Murry intended for filing in another lawsuit was inadvertently designated for filing in this case. Murry has written to point out that he is not a party to this lawsuit. The complaint bears out his contention. Murry's name is not one of the more than 80 names listed in the caption and Murry has not signed the complaint. Thus, the error has been corrected by removing Anthony Murry's name the caption of this order.

This is a civil lawsuit brought by several prisoners at the Supermax Correctional Institution in Boscobel, Wisconsin. Petitioners have paid the fee for filing this lawsuit.

As an initial matter, the court has received a letter from petitioner David Hudson which I construe as a motion for leave to withdraw from this case. The motion will be granted. Mr. Hudson will not be considered a party to this action.

In their complaint, petitioners allege that respondents have violated their right to reasonable search and seizure by taking a DNA cheek swab sample from them. Petitioners allege also that some of them are Muslim, and that Wis. Stat. § 165.76, which is the law requiring them to surrender DNA samples, violates their right to religious freedom because their genetic code belongs to Allah.

In Williams v. Berge, Case No. 01-C-284-C (W.D. Wis. Sept. 6, 2001) (copy attached), I held that requiring convicted felons to give cheek swab samples of DNA did not violate the inmates' Fourth Amendment privacy interests. For the reasons stated in that opinion, petitioners' Fourth Amendment claim will be dismissed for failure to state a claim upon which relief may be granted.

Moreover, petitioners cannot prevail on their contention that Wis. Stat. § 165.76, which requires all persons "in prison on or after January 1, 2000, for a felony committed in [Wisconsin]" to give DNA samples, see Wis. Stat. § 165.76(1)(a)(ar), impermissibly infringes their right to free exercise of religion as protected by the First Amendment. "[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally

applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."). "After Smith the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else . . . only intentional discrimination . . . is actionable under Smith." Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 117 S. Ct. 2502 (1997). The law petitioners challenge is neutral and generally applicable to all persons in Wisconsin's prisons who have been convicted of a felony committed in Wisconsin. The law does not target Muslims and was not enacted in an effort to discriminate against Muslims. It was enacted to promote a legitimate goal of permanently identifying convicted felons in an effort to assist in determining the perpetrators of past and future crimes. Therefore, petitioners' claim that their First Amendment rights have been violated will be dismissed as legally frivolous.

#### ORDER

IT IS ORDERED that

- 1) Petitioner David Hudson's motion to withdraw from this action is GRANTED;

2) The remaining petitioners' request for leave to proceed in forma pauperis on their claims that respondents violated their Fourth Amendment right to reasonable search and seizure and their First Amendment right to religious freedom by taking a DNA cheek swab sample from them is DENIED. Petitioners' Fourth Amendment claim is DISMISSED for petitioners' failure to state a claim upon which relief may be granted and their First Amendment claim is DISMISSED as legally frivolous;

3) A strike will be recorded against each petitioner except petitioner David Huson pursuant to § 1915(g); and

4) The clerk of court is directed to enter judgment and close the file.

Entered this 24th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge